IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

FRIDAY, THE 27TH JULY 2007 / 5TH SRAVANA 1929

WP(C).No. 21208 of 2006(Y)

OS.147/2000 OF II ADDL.SUB COURT,ERNAKULAM.

PETITIONER:

THE KERALA ELECTRIC TRADES ASSOCIATION, REG.NO.ER 350/81,KETA CENTRE,P.B.NO.2430, CHITTOOT ROAD.ERNAKULAM VILLAGE,KOCHI-16,REP.BY ITS PRESENT SECRETARY, MR.R.MOHAN PRASAD,AGED 61, S/O.LATE G.V.RAMANAN, ATHULYA ENTERPRISES,MATHER-SQUARE,B-12,2ND FLOOR,OPPOSITE TOWN RAILWAY STATION, ERNAKULAM, KOCHI-18.

BY ADV. SRI.N.HARIDAS,
ADV. SRI.H.SUNDEEP HARIDAS,
ADV. SRI.P.N.SASIDHARAN.

RESPONDENTS:

1. **P.K.PRADEEPAN, S/O.PALAKKATTUVEETTIL KRISHNAN NAIR, BRAHMAPURAM DESOM, PUTHENKURISU VILLAGE, KUNNATHUNADU TALUK, DOING BUSINESS IN THE NAME AND STYLE "QUALITY MACHINES & SPARES",CC XXXIX/1803, KETA CENTRE, CHITTOOR ROAD.,ERNAKULAM VILLAGE, KOCHI-16.**

2. **MATHEW GEORGE, S/O.KARTHIKAPPALLIL VEETTIL K.J.GEORGE, M/S.AEGEE ENTERPRISES, NETTIPADAM ROAD, ERNAKULAM VILLAGE, KOCHI-16.**

3. **R.VELAYUDHAN NAIR, S/O.S.RAGHAVAN PILLAI VEE VEE COMBINES, DEVI COMPLEX, DORAISWAMY IYER ROAD, ERNAKULAM VILLAGE, KOCHI-35.**

4. **DISTRICT COLLECTOR, ERNAKULAM.**

BY GOVT. PLEADER SRI. SHYSON P. MANGUZHA,
ADV. SRI.P.N.RAMAKRISHNAN NAIR,
SRI.P.VISWANATHAN,
SRI.N.SUBRAMANIAM,
SRI.M.S.NARAYANAN.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 27/07/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P.1: COPY OF THE JUDGEMENT DTD. 13/06/2005 IN O.S. NO. 147/2000 OF THE HONOURABLE SUB COURT, ERNAKULAM.

EXT.P.2: COPY OF THE I.A. NO. 147/2004 DTD. 03/10/2003 IN O.S. NO. 147/2000 FILED BY THE 1ST DEFENDANT BEFORE THE HONOURABLE SUB COURT, ERNAKULAM.

EXT.P.3: COPY OF THE OBJECTION DTD. 13/01/2004 IN I.A. NO. 147/2004, FILED BY THE PETITIONER BEFORE THE HONOURABLE SUB COURT, ERNAKULAM.

EXT.P.4: COPY OF THE ORDER DTD. 30/06/2005 IN I.A. N. 147/2004 IN O.S. NO. 147/2000 OF THE HONOURABLE SUB COURT, ERNAKULAM.

EXT.P.5: COPY OF THE ORDER IN PROCEEDINGS NO. A2.40925/05 DTD. 18/04/2006 PASSED BY THE R.4.

RESPONDENT'S EXHIBITS: **NIL.**

//TRUE COPY//

prv.

PIUS C. KURIAKOSE, J.

W.P.(C)No. 21208 OF 2006

Dated this the 27th day of July, 2007

J U D G M E N T

Ext.P4 order of the learned Subordinate Judge impounding a document which had been marked as Ext.A16 by the plaintiff in the proof affidavit which he had filed in the suit and forwarding the original of that document to the District Collector to determine the deficit stamp duty and penalty is under challenge in this writ petition filed by the plaintiff under article 227 of the Constitution of India. Also under challenge is Ext.P5 order passed by the District Collector determining Rs.6550/- as the correct stamp duty and Rs.15,000/- as the penalty payable by the plaintiff who produced document before the court under section 39(b) of the Kerala Stamp Act, 1959. The document in question was the original of a lease deed executed between the plaintiff and M/s. Arjun Amaravathy Chits (P) Ltd. a tenant of the plaintiff for a period of three years. The stamp duty payable on the lease deed which provides for a monthly rent of Rs.11,000/- in terms of Article 33(2) of the Schedule to the Kerala Stamp Act is 5% of Rs.6,600/-. But as against that requisite stamp duty what had been paid was only Rs.50/-. Though the document had been marked as Ext.A16 by the plaintiff the learned Subordinate Judge noticed that the

document in as much as it creates a lease for a period exceeding one year and hence was compulsorily registrable document and for the above reason as well as for the reason that the same had been insufficiently stamped did not rely on the document at all for deciding the issue in the suit. In fact even before the suit was disposed of the first defendant had filed an interlocutory application IA. No.147/04 for an order impounding the document and for forwarding the document to the District Collector so as to enable the State to recover the stamp duty and penalty payable on the document. The suit was decreed by the learned Subordinate Judge on 30-6-2005 relying on the evidence in the suit and Ext.A16 and Ext.P4 order was passed allowing the IA. And forwarding the original of the document to the District Collector. The District Collector passed Ext.P5 pursuant to Ext.P4 and the forwarding letter which was sent to him by the learned Subordinate Judge who issued Ext.P5 order. Under Ext.P5 order it has been rightly found by the District Collector that the deficit stamp duty payable on the original of Ext.A16 is Rs.6550/-. Under Ext.P5 the District Collector in exercise of the discretion granted to him under section 39(b) determined that Rs.15,000/- is the penalty payable.

Assailing Ext.P5 on the various grounds raised in the writ petition

Sri.N.Haridas, learned counsel for the petitioner argued that Ext.P2 petitioner, pursuant to which Ext.P4 order was passed by the learned Sub Judge, was filed bay the defendant some 3 ½ months after the proof affidavit marking the document as Ext.A16 was filed before the court and the plaintiff was cross examined by the respondent as PW-1. No objection whatsoever was raised by any other respondents opposing the marking of the Ext.A16 on the ground that the document was liable to be impounded. The case had been adjourned for further cross examination by PW-1 to 10-10-2003 and thereafter also there were several postings for further cross examination of PW-1. On none of these days anybody challenged the validity of the document or objected to the marking of the document on the ground of want of registration or insufficiency of stamp duty. Ext.P2 petition was filed only on 7-12-2004. The said petition should not have been entertained by the learned Subordinate Judge at all. Learned counsel relied on strongly on the judgment of this Court in George v. Subordinate Judge, Kottayam, 1976 KLT 700 and also the judgment of the Supreme Court in Syamal Kumar Roy v. Sushil Kumar Agarwal, (2006) 11 SCC 331.

The submissions of Mr.Haridas were resisted by the learned

counsel for the respondents via. Sri.P.Viswanathan, counsel for the first respondent and Sri.N.Subramanian,counsel for the third respondent. Considering the Government's interest in the matter I heard the submissions of Sri.Shyson P.Manguzha, learned Government Pleader also.

It is true that a learned Judge of this Court, K.K.Narendran, J. as in George's case (supra) held that after marking a document and admitting the same in evidence there is nothing that can be done by the court in the matter of impounding of the document and that in such situations the applicable provision was Section 59 of the Stamp Act and no other provision and much less sections 33 or 37 of the statute. In fact the judgment in George's case was cited before the learned Sub Judge who was not inclined to follow that decision on his view that in the context of the amendments introduced in rule 4 of Order 18 C.P.C. by amending Act 22/02 with effect from 1-7-2002 the decision n o longer be relevant. The facts of the case decided by the Supreme Court in Syamal Kumar Roy v. Sushil Kumar Agarwal will also indicate that the trial in that case was also following the procedure regarding recording of evidence of witnesses as the same stood to substantiation of rule 4 of Order 18 in its present form. In other

words, in that case as well as in the case decided by Justice Narendran, the documents in question had been permitted to be marked and proved in evidence by the concerned witness in his oral evidence without any objection whatsoever from the opposite side either to the marking or to the proving of the document as evidence of the facts recorded therein. But the facts situation which obtained in the present suit is entirely different. Proof affidavit marking as many as 16 documents including A16 was filed in lieu of chief examination by the plaintiff. The marking was done bay the plaintiff himself not on orders by the court. Respondent defendant did not have any occasion to object the marking of the document and even before cross examination of PW1 in whose affidavit in lieu of chief examination the document had been marked and referred to was for an interlocutory application requesting that that the document being impounded and forwarded to the District Collector had been filed.

Marking Ext.A16 by the plaintiff in lieu of chief examination will not amount to admitting document in evidence. Such marking which is made by the witness himself only assigns a number to the document, so that the court may, if the court so decides read the document in evidence and refer to the document if necessary in the judgment or

order conveniently from the point of view of the appellate or revisional court also . Such assignment of number to the document will be convenient since the appellate court in many cases may be called upon to decide whether the marking or nonmarking of a given document or reliance placed or not placed on a document by the trial court was proper. As for the present case will not be seen that the trial court did not rely upon Ext.A16 at all on the reason that A16 was a compulsorily registrable document. In fact arguments addressed by Mr.Haridas was that since the trial court had not placed any reliance on Ext.A16 the trial court could have ignore the document and should not have forwarded to the District Collector in terms of section 37(2). It is difficult to accept this argument in view of the principles laid down by this court in George's case as well as by the Supreme Court in Shyamlal Kumar Roy's case. I have already found that the facts situation in those two cases were different. The learned Subordinate Judge has referred only to the judgment in George's case. I find the view taken by him is in support of the judgment of this court in Mohanan v. MACT, Moovattupuzha, 2005(4) KLT 273 which was delivered on 8th September 2005, after the substitution of rule 4 of Order 18 CPC in its present form. Kurian Joseph, J. in that case after

meticulous analysis of sections, 33,34, 17 and 39 of the Stamp Act and after referring to judgment of this court in Thomas Thomas v. Parameswaran Nair, (1989 (1) KLJ 16) and Uthuppan Abraham v. State of Kerala, (1997(2) KLT 475) held that it is discernible from a reading of section 133 itself that whenever an insufficiently stamped instrument comes to the notice of the court, it is not necessary that the production of the document should be followed by marking the same as part of the evidence. It is also not necessary that the document should have been relied on by the court before it is ordered to be impounded. The learned Judge has clearly held that the moment a document is produced in any proceedings before the court and if the court notices that the same is insufficiently stamped,a the court has a duty to impound the same. Such duty is part of the power provided under section 33 to take steps for evading the stamp duty. I am in agreement with the view expressed by the learned Judge in Mohanan's case. There is not infirmity whatsoever therefore about Ext.P4.

Coming to Ext.P5 the order passed by the District Collector it is seen that the District Collector has purported to pass the order in terms of section 30(b) of the Kerala Stamp Act 1959 and article 33(2) of the schedule to the said Act. In terms of section 30(b) the

obligation to pay stamp duty on a lease deed is that of the lessee in the absence of any contract. Ext.P5 order of the District Collector is directed against the petitioner lessor alone. But since the correctness of Ext.P5 with reference to section 30(b) is not under challenge and also since even before the District Collector the lessor did not argue that the obligation to pay the stamp duty and penalty is that of the lessee I assume that there is a contract to the contrary within the meaning of section 30(b) of the Stamp Act between the petitioners and their tenant. I have already found that determination of the deficit stamp duty by the District Collector is correct. The only question which survives now is whether the District Collector exercised his discretion statutorily conferred on him under section 39(b) correct in determining the penalty as Rs.15,000/-. The District Collector has statutory discretion to determine the penalty of any amount between Rs.5/- and Rs.65,500/-. Learned Government Pleader submitted that if the documents were to be impounded by the learned Subordinate Judge the penalty should necessarily have been Rs.65,500/- since unlike the District Collector the court has no discretion in the matter of determination of penalty. Therefore, according to the learned Government Pleader it is a most liberal view in favour of the petitioner

which has been taken by the District Collector. I am able to notice some merit in the submission of the learned Government Pleader. Nevertheless, considering the circumstances that the document Ext.A16 has been completely ignored by the learned Subordinate Judge as void document for want of registration I am of the view that on a better exercise of discretion under section 39(b) the penalty amount also should have been fixed at Rs.6550/-. Thus allowing the writ petition in part I pass the following orders.

Ext.P4 is confirmed. Ext.P5 is modified to the extent redetermining the amount payable by the petitioner as penalty also at Rs.6550/-. The total amount payable by the petitioner is thus refixed as Rs.13100/-.

(PIUS C.KURIAKOSE, JUDGE)

ksv/